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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN GUZMAN CASTRO,

Defendant and Appellant.

B205321

(Los Angeles County
Super. Ct. No. VA102558)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Thomas I. McKnew, Jr., Judge. Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kristofer Jorstad and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

John Guzman Castro appeals from the judgment entered upon his convictions by jury of making a criminal threat (Pen. Code, § 422, count 1)¹ and misdemeanor battery (§ 242, count 2).² The trial court sentenced him to an aggregate prison term of two years and six months. Defendant contends that the trial court abused its discretion in admitting irrelevant and highly inflammatory gang expert testimony.

We affirm.

FACTS

While visiting at his mother's Cudahy home on September 17, 2007, defendant slapped his 14-month-old nephew on the back of the head, causing him to fall and split his lip. The child's mother who is defendant's sister, Rosemary Ramirez, picked up her son and told defendant not to hit him. Defendant laughed, and told Ramirez "Shut the fuck up bitch." He then punched her several times, first in the left eye, then on her right cheek, her left shoulder, and finally in the stomach. Brother, Carlos Castro, pulled defendant away from Ramirez. Defendant told Ramirez he was going to come back and "blast [her]," which she understood to mean that he was going to shoot her. He went outside. Ramirez called the police, and defendant ran.

Ramirez was afraid defendant would kill her. Not only had she seen him with a gun the previous day, but he had been violent towards her in the past, stabbing her with a knife in the stomach four or five years earlier. Ramirez also knew that defendant was a member of the Cudahy Trece gang, which increased her fear.

The following day, defendant, who had numerous gang tattoos and used the moniker "Chino," returned to his mother's house and again threatened to kill Ramirez. The police were called and when they arrived, defendant ran. He was later found and arrested.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The jury found defendant not guilty of misdemeanor child abuse in count 3.

DISCUSSION

Detective Andrew Serrata was called to testify as a gang expert. He had investigated gang crimes in Cudahy and was familiar with the 70-member Cudahy Trece gang. He testified that the gang committed assaults with deadly weapons, robberies, narcotics offenses, murder and attempted murder, and used firearms in more than half of the crimes. Detective Serrata stated that defendant was a member of that gang and wore gang tattoos.³

Before trial, defense counsel objected to the prosecution's use of photographs and testimony of the gang expert related to defendant's gang involvement. Defense counsel argued that that evidence was more prejudicial than probative and was irrelevant. The prosecution responded that the gang expert would confirm Ramirez's fear of defendant and show that it was reasonable. The trial court deferred ruling until after hearing the victim's testimony, but stated: "I think it's a good point. And if it is cumulative . . . coming from an officer, it does seem extremely prejudicial on its surface compared to the probative value because it's what the victim believes, not what the officer knows, and what the victim believed at the time of the incident that matters in this case."

Defense counsel renewed the objection after Ramirez testified, pointing out that "the main concern with the 422 is . . . the complaining witness's subjective belief that my client is in a gang. I believe it's already been testified." He argued: "All that I think is relevant is whether she believes reasonably that he's in a gang, and I don't think this officer's testimony really goes to that so much as it goes to the actuality of it."

The trial court overruled the objection, stating, "What it does, in my opinion--and my opinion will control how I treat the objection--is that she feared for her life based on the fact that for one reason--and I think the primary reason--is that he is affiliated with a gang, and there has been evidence in that he has tattoos on his chest and his legs, and she

³ A photograph of defendant's tattoos were introduced into evidence.

said that he has tattoos all over his body. I think without tying together the significance of the tattoos to a criminal street gang and the violent and criminal activities of that gang would leave the state of the evidence as such that perhaps her belief was unfounded. I, at this point--although it is highly prejudicial, there is no question--believe it is relevant and it is important for the People to tie together the basis for her belief. And although it is prejudicial, it is--I think it's overtaken by the relevancy of the tying together the basis for her fear of her brother carrying out the threats that he made, and I'm going--for that reason I'll overrule the objection" The court said that the purpose of the evidence was to show whether her fear was justified.

Defendant's sole contention is that the trial court erred in admitting the gang expert evidence. He argues that the trial court admitted that evidence to corroborate Ramirez's testimony that she believed defendant was in a gang and to show that her fear was justified. But the testimony was (1) cumulative of Ramirez's uncontradicted testimony of defendant's gang membership and of the pictures of his tattoos reflecting gang membership; (2) irrelevant to prove Ramirez's fear because there was no evidence she knew of all of the criminal gang activities, and it does not prove whether her fear was reasonable under the circumstances; and (3) the gang evidence went far beyond what the trial court determined was admissible, and to that extent was irrelevant and prejudicial.

While defendant did not specifically mention Evidence Code section 352 in his challenge to the expert testimony, clearly that was the basis for the objection. An objection need not be in any specific form but must simply be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility. (*People v. Partida* (2005) 37 Cal.4th 428, 434-435.)

We review the admission and exclusion of evidence on relevance and Evidence Code section 352 grounds for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1198; *People v. Kipp* (2001) 26 Cal.4th 1100, 1123 [relevance objection]; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 352 [Evid. Code, § 352 objection].) Abuse

occurs when the trial court “exceeds the bounds of reason, all of the circumstances being considered.” (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

All relevant evidence is admissible. (Evid. Code, § 351.) Relevant evidence is all evidence “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) In determining whether evidence has a tendency to prove a material fact, it must be determined whether it ““logically, naturally, and by reasonable inference”” establishes fact. (*People v. Thompson* (1980) 27 Cal.3d 303, 316, overruled on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260.) A trial court has wide discretion in determining the relevance of evidence. (*People v. Warner* (1969) 270 Cal.App.2d 900, 908.)

Evidence related to gang membership is not insulated from this general rule and is admissible if it meets the test of relevance to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative. (*People v. Perez* (1981) 114 Cal.App.3d 470, 477; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) In cases not involving a section 186.22 gang enhancement, it has been recognized that ““evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]”” (*People v. Avitia, supra*, at p. 192.)

Because gang evidence creates a risk that the jury will infer that the defendant has a criminal disposition and is therefore guilty of the charged offense, and has “a highly inflammatory impact on the jury[,] trial courts should carefully scrutinize such evidence before admitting it.” (*People v. Williams* (1997) 16 Cal.4th 153, 193: see also *People v. Cox* (1991) 53 Cal.3d 618, 660.)

Even relevant evidence can be excluded if its probative value is outweighed by its prejudice or the probability it will consume too much time or confuse the issues. (Evid. Code, § 352.) “Evidence may be relevant even though it is cumulative; thus, the only ban on cumulative evidence is found in Evidence Code section 352.” (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843-1844.)

To sustain a finding that defendant made a criminal threat, the prosecution must show that: (1) defendant willfully threatened to commit a crime that would result in

death or great bodily injury; (2) the threat was made with the specific intent that it be taken as a threat, regardless of whether defendant intended to carry it out; (3) the threat, on its face and under the circumstances in which it was made, was so unequivocal, unconditional, immediate and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat; and (4) the threat caused the person threatened reasonably to be in sustained fear for his or her own safety or that of his or her family. (§ 422; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536.) The challenged evidence was admitted with regard to the fourth element.

An expert may be called to offer an opinion when it relates to a subject “that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact” and is “based on matter . . . known to the [expert].” (Evid. Code, § 801.) Presumably, most jurors lack the familiarity with criminal street gangs to have a full appreciation of the nature of gang activity. Here the detective established the basis for his expertise--his familiarity with the Cudahy Trece gang, that the gang was involved in assaults, robberies, narcotic sales, murders and attempted murders, more than half of which crimes were committed with firearms, that there were 70 members of that gang, that defendant was a member and that he wore tattoos reflecting gang membership.

This testimony provided the jury with a tool to determine whether Ramirez’s fear was objectively reasonable. The element of fear has both an objective and subjective component: the threatened party’s fear must be real and it must be reasonable. (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 417.) Ramirez testified that defendant threatened to “blast her.” She had seen him with a gun just the day before, demonstrating his capability of following through on this threat and giving credence to her fear. Further, defendant had just beaten her. This attack alone was sufficient for her to reasonably believe that he would carry out his threat of further violence. But there was more. Defendant had been violent toward Ramirez in the past, having stabbed her with a knife several years before the charged incident. She had seen gang tattoos all over his body, and was aware of his gang membership. She testified that his gang membership made her more fearful. The expert opinion testimony provided an explanation of the gang activity

and gave context to Ramirez's concerns by demonstrating the objective reasonableness of her fear. The expert testimony also served to corroborate Ramirez's subjective fear of defendant. Thus, the admission of the challenged testimony was well within the discretion of the trial court.

However, had the evidence been improperly admitted, such error was harmless. The erroneous admission of gang or other evidence requires reversal only if it is reasonably probable that appellant would have obtained a more favorable result had the evidence been excluded. (Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Jordan* (2003) 108 Cal.App.4th 349, 366; *People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1498.) It is not reasonably probable that exclusion of the challenged evidence would have resulted in a verdict more favorable to defendant in this case.

The evidence against defendant was strong, if not overwhelming, and largely uncontradicted. Contrary to defendant's argument that the injection of gang evidence into this case transformed it into "a case of the Cudahy Trece gang . . . spreading fear and violence throughout the community," the challenged gang evidence was extremely limited, covering only a couple of pages of the reporter's transcript, and was rather bland. Detective Serrata listed some of the types of crimes committed by the Cudahy Trece gang, without elaboration or specifics of any crime, and stated that most of the crimes involved the use of a firearm. The testimony that defendant was a gang member and had gang tattoos corroborated both Ramirez's uncontradicted testimony in that regard and the pictures of defendant's tattoos.

Furthermore, any potential for prejudice was minimized by the limiting instruction given by the trial court wherein the jury was told to consider the gang evidence "only for the purpose--limited purpose of deciding whether the threat actually caused [Ramirez] to be in sustained fear for her own safety, and [Ramirez's] fear was reasonable." The jury was cautioned not to "conclude from this evidence that the defendant is a person of bad character or that he was or has a disposition to commit crime."

In short, defendant has failed to show that it is reasonably probable that he would have obtained a more favorable verdict had the court not erred. (*People v. Watson*, *supra*, 46 Cal.2d 818.)

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST